Supreme Court, U.S.
FILED
SEP 30 1991
OFFICE OF THE CLERK

(2)

No. 91-525

In The

Supreme Court of the United States

October Term, 1991

JEROME HOWARD HANOVER,

Petitioner,

v.

ROBERT M. RUCH, M.D.,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Tennessee At Jackson

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

HAL GERBER, TN B.P.R. #8826
GERBER LAW OFFICES
80 Monroe Avenue, Suite 410
Memphis, Tennessee 38103
(901) 523-0019

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

A. Petitioner has mischaracterized the decision of the Tennessee Supreme Court 1

B. This Court should not grant certiorari to consider constitutional issues not raised in the state court proceedings 4

C. Petitioner was afforded due process 5

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASE LAW

Cardinale v. Louisiana, 394 U.S. 437 (1969) 4

Hill v. California, 401 U.S. 797 (1971) 4

Hughes v. Washington, 389 U.S. 290 (1967) 1, 2

ARGUMENT

A. Petitioner has mischaracterized the decision of the Tennessee Supreme Court.

The principal thrust of the Petition for Certiorari is that the Opinion of the Supreme Court of Tennessee violates the due process clause of the Fourteenth Amendment to the United States Constitution because it is said to have retroactive effect.

Petitioner asserts that the Tennessee Supreme Court has given retroactive effect to an act of the Tennessee General Assembly, which it did not. In support, reference is made to a host of reported cases. A review and discussion of those cases reveals that, with one exception, they concern themselves with the retroactive application of legislation (Petition, p. 33).

Hughes v. Washington, 389 U.S. 290 (1967) arose out of a fact setting wholly dissimilar to those presented here. *Hughes* involved a controversy over the ownership of gradual accretions of land along the coast of Washington. The Plaintiff traced her title to a federal grant. Federal law in effect at the time of the grant had preserved ownership of accretions to the adjoining landowner. The Constitution of Washington, however, which was adopted after the particular grant from which Plaintiff derived her title, deprived the adjoining landowners of ownership of the accretions. The Washington Supreme Court, ruled that the state constitutional provision controlled and held that all accretions formed since the adoption of the state constitution would belong to the state of Washington. This Court reversed, holding that federal law would control. Petitioner here cites, out of context, a portion of the

last sentence of a concurring Opinion by Justice Stewart. That opinion, when read in its entirety, stands for the proposition that a dramatic change in state law cannot defeat the property interests of landholders whose rights have been established and defended under federal law and previous state law. Neither the facts nor the legal analysis in *Hughes* has any applicability to the current case.

The opinion of the Tennessee Supreme Court made no attempt to give retroactive affect to legislation. Neither did it seek to make retroactive a change in the state common law. Rather, it rendered a decision based on the facts and legal arguments presented by this case. The Complaint alleged claims for alienation of affections and criminal conversation. As noted by Petitioner and the opinion of the Tennessee Court of Appeals, Respondent has, at every stage of the proceedings, moved the abolition of criminal conversation as a cause of action in Tennessee (Petition, p. 3, Appendix – p. 22). Actually, the issue was originally raised in the trial court pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure, which is identical in all pertinent respects to Federal Rule 12(b)(6). When first served with the complaint in this case, Respondent alleged that the complaint did not state a claim upon which relief should be granted. He then moved to dismiss. The trial court, bound by prior state and appellate decisions, overruled the motion. At trial, the jury returned a verdict for Respondent on the issue of alienation of affections but for Petitioner on the claim of criminal conversation (Petition Appendix pp. 4, 21). On appeal, the Tennessee Court of Appeals unmistakably indicated that criminal conversation should no longer be

a part of Tennessee law, but, once again, felt constrained by previous opinions of the Tennessee Supreme Court. The Court of Appeals, in fact, stopped just short of suggesting that the Respondent should seek further review.

The Tennessee Supreme Court dealt, first, with its authority to decide whether or not criminal conversation could be judicially abolished. The Tennessee General Assembly, after the trial in this cause, passed legislation which abolished criminal conversation (Petition, pp. 4, 33)[1]. That legislation did not, however, affect this case which arose and was tried prior to the action of the General Assembly. The Tennessee Supreme Court found that there was no legislation which controlled the controversy and, therefore, it was the final arbiter of the state of the common law at the time the controversy arose. Any reliance on the actions of the General Assembly was only additional and cumulative evidence that the theories of recovery no longer conformed to public policy. The opinion relied to a greater degree on the legislation and case law of sister states.

The decision below, therefore, does not have to do with retroactive application of law. The Tennessee Supreme Court in effect held that the complaint did not state a claim against the Respondent upon which relief could be granted. Respondent had, as noted above, consistently so argued from the beginning.

---

[1] Criminal conversation was abolished prospectively, to become effective January 1, 1991. Since it continued to exist as a common law cause of action until that date, it was still susceptible to the same attack as that mounted by Respondent in 1986 when the complaint was filed in this case.

B. This Court should not grant certiorari to consider constitutional issues not raised in the state court proceedings.

Conspicuously absent from the opinions of the Tennessee Appellate Courts is any mention or analysis of the constitutional issues presented herein by the Petitioner. Those issues are not absent from the consideration of the courts below due to omission. The constitutional issue was, in fact, never raised before the trial court, the Tennessee Court of Appeals or the Tennessee Supreme Court.[2]

This Court has long held that, in reviewing the decisions of state courts, it will not consider constitutional issues which were not raised, preserved or passed on in the state courts. *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Hill v. California*, 401 U.S. 797 (1971).

> In the context of that case, we indicated the desirability of allowing state courts to pass first on the constitutionality of state statutes in light of a federal constitutional challenge; this assures both an adequate record and that the States have first opportunity to provide a definitive interpretation of their statutes.

Hill, 401 U.S. at p. 6.

---

[2] It should be noted that the Petitioner did claim a denial of due process under the United States Constitution in a Petition to Rehear filed in the Tennessee Supreme Court, which was denied (Appendix to Petition, p. 2).

Although the quoted language applies to a criminal case and concerns the constitutionality of statutes, the same reasoning or rationale applies to the present case. The due process arguments were neither considered nor decided by the courts below.

C. Petitioner was afforded due process.

The Petition alleges a denial of due process. To the contrary, the opinion of the Tennessee Supreme Court shows that Petitioner was afforded due process.

Petitioner filed a complaint in the Tennessee state court. Respondent answered, alleging that the complaint did not state a claim upon which relief could be granted because recovery for criminal conversation was repugnant to public policy and had no legal merit. That defense was argued and decided adversely to respondent. The issue was appealed to the Tennessee Court of Appeals and affirmed. Finally, it was reviewed by the Tennessee Supreme Court upon briefs and oral argument by counsel for both parties. Now, since that Court decided the issue adversely to the Petitioner, he argues that he did not have opportunity to defend "vested" property rights. He seeks to have this Court construe the decision of the Tennessee Supreme Court as one which makes retroactive an act of the Tennessee General Assembly.

Actually, the Tennessee Supreme Court handled this matter as it must any other. It considered the facts and legal arguments presented by the parties before it. Based on those facts and arguments, it determined that a change

in the state common law was mandated. That determination vacated a previous jury verdict. The current attack on that opinion is, in truth, not rooted in a good faith argument that there was a failure of due process protection. Rather, Petitioner seeks to have this Court find that the decision below was wrong. The Petition for Writ of Certiorari should not be granted to achieve that purpose.

In pursuit of his argument, Petitioner seems to confuse the role of the Supreme Court of Tennessee. He asserts that " . . . five men sitting as a judicial body can arbitrarily substitute their *personal, not legal,* beliefs . . . " (Petition, pp. 4, 17). This characterization is not only an affront to the Supreme Court of Tennessee, but there is absolutely nothing in the record to support it. Moreover, in an apparent Freudian slip, Petitioner repeatedly refers to "five men" in describing the composition of the Tennessee Supreme Court. Actually, four members are male and one is female.

CONCLUSION

For the reasons stated, the Petition should be denied.

Respectfully submitted,

GERBER LAW OFFICES

HAL GERBER (8226)
Attorney for Respondent
80 Monroe Avenue
Suite 410
Memphis, Tennessee 38103
(901) 523-0019